BRIEF FOR APPELLANT, UNITED STATES OF AMERICA

In the United States Court of Appeals for the Ninth Circuit

No. 12529

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK WALLACE AND R. M. MAKEMSON, DOING BUSINESS AS WALLACE AND WALLACE, A PARTNERSHIP, APPELLEES

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, PHOENIX DIVISION

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STATEMENT OF PLEADINGS AND FACTS

This is a civil action brought by the United States of America, as plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944 (50 U. S. C., App., Sec. 1635(b),[1] to recover damages as provided by Section 26(b) of said statute, on account of certain acts alleged in the Complaint to have been committed by the defendants in violation of Section 26(b) of said statute. These alleged violations of Section 26(b) concerned the purchase of certain surplus Government

[1] Repealed and reenacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949; Public 152, 81st Cong., 1st Sess.

properties from the War Assets Administration at Port Hueneme, California and at Rivers, Arizona between February 1, 1946 and July 1, 1946 (T. R. 8).[2] The complaint (T. R. 7-15) which was filed on April 14, 1947, prayed for: (1) the issuance of a temporary restraining order to prevent disposition, or encumbrance, of any of the nine items of surplus property described in the complaint (T. R. 13); (2) the issuance of a similar preliminary injunction (T. R. 13); (3) judgment restoring the described surplus properties to the United States, which would be permitted to retain, as liquidated damages, the entire consideration which defendants had given for such properties (T. R. 14); or, in the alternative, (4) judgment for $32,627.42 together with interests and costs (T. R 14) and such other, further, and different relief as the court may deem just and proper (T. R. 14).

The complaint principally alleged that the defendants conspired to (T. R. 9), and actually did have a certain veteran of World War II acquire surplus properties (T. R. 10 and 11) which had been offered for sale exclusively to veterans of World War II for their own use (T. R. 8), and that, in accordance with the conspiracy, the veteran concerned delivered to defendants each of the following items as soon as they had been delivered to him (T. R. 11):

Date	Surplus Property	Serial No.	Purchase Price
2/27/26	Lima 750 Shovel	IN 9345	$17,315.00
3/26/46	LeTourneau Carryall	523561	3,363.75
4/9/46	Dodge Cargo Truck, 1½ tons (Motor # T74-9898)		371.46
4/9/46	Dodge Cargo Truck, 1½ tons	8290536	368.16
4/9/46	Dodge Pick-up Truck	8093319	395.14
6/3/46	International Cargo Truck, 2½ tons	25162	2,060.00
6/8/46	International Dump Truck, 2½ tons	39840	2,917.97
6/8/46	International Dump Truck, 2½ tons	39848	2,917.97
6/8/46	International Dump Truck, 2½ tons	39976	2,917.97

[2] When used in this brief, "T.R." refers to the printed Transcript of Record.

The defendants filed their response to the Government's motion for a preliminary injunction (T. R. 18-20); and, at the hearing on this motion on April 21, 1947, the Government introduced both oral and documentary evidence in support of its motion, but defendants introduced no evidence in behalf of their opposition. Accordingly, the court below found the facts to be substantially as alleged in the complaint (T. R. 21-23), and issued its preliminary injunction (T. R. 24-26).

A stipulation was filed on May 1, 1947, providing that defendants should have until May 20, 1947 in which to file their Answer (T. R. 3). On June 2, 1947 defendants filed their Answer (T. R. 26-7).

In their Answer, defendants admit that the War Assets Administration sold and the veteran purchased all of the surplus property described in the Complaint; and that, except Dodge Cargo Truck (No. 8290536), all these properties were in defendants' possession, use, and control (T. R. 26 and 27). The Answer denied all allegations concerning the conspiracy to acquire, and the actual acquisition of the surplus properties, the purpose for which the sales had been conducted, the statutory liabilities and the relief sought (T. R. 27). The Answer, then, affirmatively alleges that defendants rented the Lima Shovel and purchased the other surplus properties from the veteran for use in road construction work for the State of Arizona and for the United States (T. R. 27).

The case was called for the setting of a trial date on April 19, 1948; but on motion of the Government, the case was ordered passed on the calendar (T. R. 4). The case was again called for the setting of a trial date on February 14, 1949, at which time the Government moved for the setting of a trial date, and the court below ordered the trial set for May 10, 1949 (T. R. 4). On May 6, 1949 the order setting the case for trial on May

10, 1949 was vacated (T. R. 4) in order to permit the Government to consider an offer in compromise which had been made by defendants (T. R. 41 and 42). On October 31, 1949, the offer in compromise having been rejected, the case was set for jury trial on January 20, 1950 (T. R. 4).

On January 11, and 13, 1950 the Government filed praecipes for subpoenas to Herbert Meyer Williams, among others (T. R. 5); and the Marshal filed his returns on January 17, 1950 showing no service on Herbert Meyer Williams (T. R. 5). The record of Filings and Proceedings fails to indicate that any praecipe for subpoena was ever filed on behalf of defendants (T. R. 2-7).

The case was called for trial on January 20, 1950, and defendants announced ready for trial. The Government then stated that, due to inability to locate its principal witness (Herbert Meyer Williams, the veteran mentioned in the Complaint), the Government was not ready for trial and was unable to make any showing as to when the witness would be available. The Government then moved for dismissal without prejudice. Defendants objected to this motion, and moved for dismissal with prejudice (T. R. 38-9; and 41-2). The court below then ordered the case dismissed with prejudice (T. R. 31). On January 24, 1950 Judgment dissolving the injunction and dismissing the action with prejudice was entered and filed (T. R. 32). Notice of Appeal was filed by the Government on March 20, 1950 (T. R. 33).

The court below had jurisdiction of the subject matter of the proceedings under Section 26(c) of the Surplus Property Act of 1944 (50 U. S. C., App., Sec. 1635 (c)), as alleged in paragraph I of the Complaint (T. R. 7 and 8).

This Court has jurisdiction, upon appeal, to review the judgment below under U. S. C., Title 28, Sec. 1291.

RULING OF THE COURT BELOW

Minute Entry of October 1949 term, dated Friday, January 20, 1950, for the court below, in this cause, reads as follows (T. R. 31):

> This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney and E. R. Thurman, Esquire, Assistant United States Attorney, are present for the Government. Norman S. Hall, Esquire, and James H. Green, Jr., Esquire are present for the defendants, and announce ready for trial.
>
> Frank E. Flynn, Esquire, now states that, due to the inability of the Government to locate its principal witness who is reported to be in Mexico, the Government is not ready for trial and unable to make any showing as to when the witness will be available. Said counsel for the Government now moves for dismissal without prejudice.
>
> IT IS ORDERED that the case be and it is dismissed with prejudice.

STATUTES AND COURT RULES INVOLVED

I

Section 26(b) of the Surplus Property Act of 1944 (50 U. S. C., App., Sec. 1635(b)) reads as follows:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person, any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have

sustained by reason thereof, together with the costs of suit, or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

II

Rule 41 of the Federal Rules of Civil Procedure reads as follows:

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff: by stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all the parties, who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivison of this rule, an action shall not be dismissed at the plaintiff's instance save upon an order of the court and upon such

terms and conditions as the court deems proper. If a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counter-claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury, the court as the trier of facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT OF POINTS

I

It was an abuse of discretion for the court below to have denied plaintiff's motion to dismiss without prejudice, and then to have granted defendant's motion to dismiss with prejudice.

II

It was error for the court below to have dismissed the action with prejudice without having afforded plaintiff the opportunity to protect its cause of action.

ARGUMENT

I

It Was an Abuse of Discretion for the Court Below to Have Denied Plaintiff's Motion to Dismiss without Prejudice, and Then to Have Granted Defendants' Motion to Dismiss with Prejudice

Prior to the adoption of the Federal Rules of Civil Procedure, the plaintiff, at law had an absolute right to discontinue his action at any time prior to the rendering of a verdict or judgment, and this right was recognized as substantial. *Ex Parte Skinner & Eddy Corporation,* (1924), 265 U. S. 86, 92-3, and cases cited. In equity, the complainant ordinarily had the undisputed right to dismiss without prejudice before final hearing. *Ex Parte Skinner & Eddy Corporation, supra,* and cases cited; *United Motors Service, Inc.* v. *Tropic-Aire, Inc.* 8 Cir., (1932), 57 F. (2d) 479, 481-2 and 486, and cases cited; *Jones* v. *Securities & Exchange Commission,* (1936), 298 U. S. 1, 19-22. The exception was where respondent had acquired some substantial right and where such a right was jeopardized by a potential dismissal without prejudice. As was said in *Pennsylvania Globe Gaslight Co.* v. *Globe Gaslight Co.,* Cir. Ct., Dist. of Mass., (1902), 121 F. 1015, 1016:

> The general rule that a complainant has the right to dismiss his bill at any time before hearing is too firmly established to require any citation of authority. It is equally well-settled that the annoyance to the defendant of a second litigation is no ground for refusing to dismiss the bill. The only question which can arise in any given case is

> whether the complainant comes within the exceptions to the rule. These exceptions may be briefly stated: First, where the dismissal would deprive the defendant of some substantial right which has accrued to him since the suit was commenced; second, where the defendant prays for, or is entitled to, some affirmative relief, as for example, where there is a cross-bill.

This doctrine was affirmed by the Supreme Court in *Jones* v. *Securities & Exchange Commission,* (1936), 298 U. S. 1, where the Court said, at page 22:

> * * * plainly enough, under the decisions of this court, the doctrine that a dismissal must be granted if no prejudice be shown beyond the prospect of another suit, *unless there be a specific rule of court to the contrary,* is applicable, and the withdrawal should have been allowed as of course. (Emphasis by the Court).

Since appellees have acquired no material, substantial right since this action was instituted, and have sought no affirmative relief, the appellees have not brought themselves within any recognized exception to the complainant's right to dismiss without prejudice as it existed in federal practice prior to the adoption of the Federal Rules of Civil Procedure.

The effect of the adoption of Rule 41 [3] of the Federal Rules of Civil Procedure, especially the provisions of paragraph (a)(2) pertaining to supervision of the court, was to codify and make definite preexisting practices as well as to confer upon courts, in all civil actions, the power of equity courts to impose upon a plaintiff's dismissal without prejudice, such terms and conditions as may be proper under the peculiarities of the par-

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[3] Rule 41(a)(1) of the Federal Rules applies only to voluntary dismissal before answer is filed, and, hence, is inapplicable in the present case. However, Rule 41(a)(2) provides for dismissal without prejudice after answer has been filed, and fits this case perfectly.

ticular case at hand. *Home Owners' Loan Corp.* v. *Huffman,* 8 Cir., (1943), 134 F. (2d) 314, 317; *Hydraulic Press Mfg. Co.* v. *Williams, White & Co.,* 7 Cir., (1947), 165 F. (2d) 489, 495. Accordingly, where it is clear on the record that no undue harm need come to defendants, the proper exercise of judicial discretion is confined to the determination of what terms and conditions must be incorporated in the dismissal order to adequately protect defendants.

In March of this year the Court of Appeals for the Seventh Circuit reached this very conclusion in *Bolton* v. *General Motors Corporation,* 7 Cir., (1950), 180 F. (2d) 379. The court said, at page 381, with reference to Rule 41:

> In our view, the absolute right of a plaintiff to dismiss under (a)(2) is restricted only by the requirement that it be done "upon order of the court and upon such terms and conditions as the court deems proper." The discretion of which the authorities speak, and sometimes confusingly, is as to the "terms and conditions" rather than to the right of the plaintiff to have such "terms and conditions" fixed and to dismiss without prejudice upon compliance therewith. * * *

Cf. Lawson v. *Moore et al.,* D. C. for W. D. of Va., (1939), 29 F. Supp. 175; *Wilson* v. *Jolly,* D. C. for N. D. of Tex. (1948), 7 F.R.D. 649. The *Bolton* case, *supra,* was an appeal from an order granting summary judgment for defendant in a personal injuries action brought in Illinois where the Statute of Limitations barred the action. The plaintiff had sought dismissal without prejudice in order to bring the action in Missouri where the action was not as yet prescribed. Defendant's answer had set up the Statute of Limitations and also averred that a prior settlement, under the Missouri Workmen's Compensation Act, had re-

lieved defendant of its tort liability. The district court had granted defendant summary judgment on the ground, apparently, that the action was barred by the Statute of Limitations. As has been seen, the Court of Appeals sustained plaintiff's contention that the denial of his motion for dismissal without prejudice constituted an abuse of discretion.

The present case is considerably stronger than the *Bolton* case, *supra,* for here appellees have no such favorable equities as a prior settlement or the Statute of Limitations.

On the law as set out above, then, it appears to be thoroughly established in federal jurisprudence that, under Rule 41 (a)(2) of the Federal Rules of Civil Procedure, where it is clear that defendants can be adequately protected from undue harm by the imposition of terms and conditions, the proper exercise of judicial discretion is confined to the determination of what must be the "terms and conditions" of the dismissal without prejudice. Thus a court is not free to deny outright plaintiff's motion for dismissal without prejudice.

In the present case the only injury, aside from the harassment of unsettled potential litigation, cited by appellees was that which may have been caused by the injunction. That such an injury is utterly irrelevant is perfectly obvious on even a moment's reflection. It is elementary that dismissal of the principal suit effects the dissolution of the ancillary injunction in aid of that suit, for on dismissal of the principal suit the injunction becomes *functus officio* and is left without the necessary foundation for any sort of an adjudication. Thus the dismissal without prejudice will remedy the very situation of which appellees complain, so that it is clear that the court below was not faced with anything like a situation in which no "terms and conditions"

will be sufficient to adequately protect defendants from legal prejudice to substantial rights.

That the discretion vested in courts is not arbitrary, but judicial in nature so that well-settled principles of procedure cannot be disregarded under the cloak of discretion appears to be a proposition of law that need not be labored. *International Shoe Co.* v. *Cool,* 8 Cir., (1946), 154 F. (2d) 778, 780; cert. den. 329 U. S. 726. It is evident, then, that the court below abused its discretion by refusing to apply well-settled law to what amounted to a conceded set of facts. The authorities overwhelmingly declare that plaintiff has the absolute right to dismiss without prejudice, and that this dismissal is to be conditioned only upon adequate protection of certain substantial rights of defendants. In the present case, appellees have not shown themselves in need of any protection, so that appellant's motion should have been granted as a matter of course. Denial of appellant's right to dismiss without prejudice was an abuse of discretion, for, as the late Justice Brandeis said, in *Union Tool Co.* v. *Wilson,* (1922), 259 U. S. 107, 112:

> * * * legal discretion * * * does not extend to a refusal to apply well-settled principles of law to a conceded state of facts. * * *

II

It Was Error for the Court Below to Have Dismissed the Action with Prejudice without Having Afforded Plaintiff the Opportunity to Protect Its Cause of Action

In *Field* v. *American-West African Line, Inc.,* 2 Cir., (1946), 154 F. (2d) 652, the Court of Appeals for the Second Circuit held that the trial court had not abused its discretion in dismissing the case for want of prosecution when issue had been joined nearly five years earlier, and the plaintiff was presently insane with only

a remote chance of recovering. But, despite this holding, the Court of Appeals modified the judgment in order to permit plaintiff's attorney to elect the alternative of going to trial upon depositions which had already been taken. In other words, the Court of Appeals, in effect, imposed a condition upon the unready plaintiff's action; but it refused to deny absolutely his right of action because of his then present difficulties.

In *Peardon* v. *Chapman et al.,* 3 Cir., (1948), 169 F. (2d) 909, 913, the Court of Appeals for the Third Circuit said:

> * * * the record shows that there were only two delays by plaintiff-appellant. * * *
> * * * With no warning of the Court's uncommunicated change of thought as to dismissal, she was not afforded an opportunity of protecting her cause of action.
> Under all the facts * * * the dismissal with prejudice of plaintiff-appellant's cause of action was unwarranted.

It is submitted that, in view of the law as set out above, the Government had every reason to confidently rely upon the court below to grant its motion to dismiss without prejudice, so that the denial of that motion came utterly without warning and the Government was deprived of its cause and right of action summarily, with no opportunity to protect its rights.

The action of the court below, in dismissing the case with prejudice, leaving the Government no opportunity whatsoever to bring the case to trial within a reasonable time and to try the case by such means as might be available, was unwarranted and, therefore, error. Certainly the absence of the witness was a severe blow to the Government; but the fact that a plaintiff may labor under a severe and undeserved handicap is not in itself sufficient ground for denying plaintiff a trial on the merits.

The contrary proposition is not and cannot be the law. A plaintiff who is denied the right to a trial on the merits is not at fault for delaying the action. Instead, such a plaintiff is denied the very opportunity for displaying his interest in securing an early decision on the merits. The want of prosecution required to justify summary dismissal with prejudice must be actual and evidenced by past failure to press the litigation. Mere prospective want of prosecution can never justify such a dismissal.

CONCLUSION

The judgment of the district court should be reversed, and the action should be reinstated with instructions for the district court to grant the motion for dismissal without prejudice.

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